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E.O. 12958: DECL: 05/10/2016
TAGS: ICRC PHUM PREF PREL NO KPAS KJUS
SUBJECT: BELLINGER TAKES ON NORWEGIAN CRITICS

REF: OSLO 403

Classified By: Pol/Econ Counselor Mike Hammer, reasons 1.4 (b) and (d)

¶1. (C) Summary. On May 9, Legal Adviser John Bellinger presented U.S. policy on detainees to Deputy Foreign Minister Johansen, parliamentarians, human rights NGOs, Norway's leading foreign policy think tank, Norwegian legal scholars, and in several media interviews. Johansen repeated Norway's view that the Geneva Convention (including all its protections) should be afforded to U.S.-held detainees. Johansen also urged humane and proper treatment of detainees at Guantanamo and elsewhere. Johansen's points reflected the core sentiment of the various groups Bellinger addressed during his packed one-day visit.

¶2. (C) In all his meetings Bellinger thoroughly explained U.S. policy on detainees, made clear that the U.S. does not torture, and stressed that we are firmly committed to upholding our international legal obligations. Bellinger delivered to MFA Legal Adviser Rolf Einar Fife our official response to Norway's March 31, 2006 note concerning the legal status of U.S.-held detainees (text of our diplomatic note included para 12). Bellinger also publicly clarified the U.S. position on Svalbard. End Summary.

Breakfast with NGOS: the Same Old Criticism
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¶3. (C) Bellinger started his long day in Oslo with a breakfast hosted by the Ambassador with Norwegian NGOs and distinguished academics. The discussion centered on the legal justification for the U.S. policy on detainees (focusing upon the framework of the Third and Fourth Geneva Conventions), the International Criminal Court (ICC), detainee treatment issues and alleged rendition flights. Bellinger stressed our interest in a greater dialogue between the U.S. and Europe, the U.S. commitment to upholding its international legal obligations and dismissed myths pertaining to U.S. treatment of detainees at Guantanamo.

DFM Johansen: Norway Demands Humane Treatment of Detainees
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¶4. (C) Legal Adviser Bellinger, accompanied by the Ambassador, met with Deputy FM Johansen and Legal Adviser Rolf Einar Fife for a discussion focused almost exclusively on detainee issues. (Note: Johansen has been the most vocal voice in the Norwegian government being critical of U.S. treatment of detainees at Guantanamo. End Note.) Johansen began by stressing that Norway is a "staunch, strong supporter on the war against terror." Norway believes terrorists are dangerous people but that they are also "human beings" who must be afforded minimum treatment standards and granted "full protections" under the Geneva Convention, he argued. Bellinger agreed detainees must be, and are, treated humanely, but noted that the detainees do not fall squarely

under the Geneva Convention, and that the term "unlawful combatants" has a basis in existing international law. DFM Johansen, noting that Al Qaida was "fundamentalist" about religion, stated that Norway was also "fundamentalist" about minimum humanitarian standards and fulfillment of the Geneva Convention. He stated his concern that the U.S. policy toward detainees could encourage other countries, such as Sudan, to adopt detainment policies. Citing his own Middle Eastern experiences, Johansen believed that popular sentiment there was that the West had one set of standards and another for Muslim countries. Johansen commented that "being firm on international law will be a factor in the fight against terror." Fife added that there was a "perception" of the erosion of the standards of rules by the West. Bellinger made clear that the United States is committed to fulfilling its international legal obligations, adding that the U.S. has established clear rules and procedures regarding the treatment of detainees.

¶5. (C) Johansen took the opportunity of the meeting to inform us of some good news, that Norway was scheduled to ratify the Third Additional Protocol on Friday, May 12. Bellinger welcomed Norway's decision and quick ratification. Note: Bellinger later delivered to Fife our response to Norway's March 31 note (reftel), concerning the U.S. position on detainees.

Print Press and Television Coverage
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¶6. (U) The Legal Adviser conducted several interviews, including with Norway's newspaper of record Aftenposten and TV 2, Norway's private network. Aftenposten ran two articles, one focusing on Bellinger explanation of U.S policy on detainees, the other reporting on Bellinger's clarification of U.S. policy toward Svalbard. On Svalbard, the newspaper quoted Bellinger as stating that the "U.S. does not disagree with Norway on Svalbard. We have not changed positions on any questions that concern Svalbard. The American position is actually the same as it has been for several decades, that is to say that we reserve the same treaty rights as other countries." The article goes on to note that according to Bellinger, the U.S. is neither behind the UK's nor Norway's positions.

¶7. (C) Comment: Bellinger was asked to clarify the U.S. policy given an erroneous report a few days earlier that the U.S. had changed its long-standing position on Svalbard and opposed Norway's position. Bellinger's public correction was a big relief to the Norwegian government, which is on pins and needles regarding what position we might ultimately take given the UK's recent challenge of Norway's position that Svalbard's continental shelf is an extension of mainland-Norway's continental shelf. End Comment.

Meeting with Key MPs on the Foreign Affairs Committee
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¶8. (C) Bellinger met with five members of the Parliament's Foreign Affairs, including Chairman Olav Axelson (Labor), Marit Nybakk (Labor), Vidar Bjornstad (Labor), Center Jon Lilletun (Christian Democrat) and Alf Ivar (Center Party). Before each parliamentarian asked pointed questions about our treatment of detainees and renditions, each stressed the importance to Norway of maintaining a strong relationship with the United States. The parliamentarians also urged that the U.S. apply the Geneva Convention to the detainees Bjornstad concluded that the reason why detainee issues are "debated so much" is that "the U.S. is so important." One of the MPs later told us that the session was "fantastic" and much appreciated by the committee's members.

Norwegian Foreign Policy Institute (NUPI) and International Law Association
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¶9. (C) Bellinger addressed a capacity crowd at NUPI. The

value of Bellinger's visit was clearly evident given that attendance at this event far exceeded expectations with over 70 packed into the room, including reporters from almost all of Norway's mainstream media covering it. Issues raised included Svalbard, Norway-U.S. relations, detainees and the Geneva Convention. One item of interest is that the local Sudanese Ambassador raised the case of Sami Al-Haj, a Sudanese whom the Ambassador claimed was an Al Jazeera cameraman, who was mistakenly interred at Guantanamo and should be released.

¶10. (C) Later, Bellinger spoke at Norwegian International Association lecture (composed of distinguished jurists and academics) for over two hours. The session was lively, with attendees challenging Bellinger on detainees and the use of Presidential signing statements, specifically with reference to the one on the McCain amendment. Of particular note were the comments of a Norwegian Supreme Court Justice who found the Guantanamo situation "completely wrong" from "a human side," perceiving that the U.S. was "degrading people" at the facility. Despite legal justifications for the U.S. position on detainees under international law, the Justice was "terrorized" and "disturbed" that the U.S. could keep people interred. In addition, a former Iranian Ambassador to Norway (who defected) made a plea for the Mujahideen E Khalq to be removed from U.S. designated terrorist group list.

John: We, and the Norwegians, thank you for coming
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¶11. (C) Comment: Bellinger's packed one-day stop was exactly what we had hoped for, an opportunity for an eloquent exposition of U.S. legal views on the detainee issue. Bellinger's message that the United States is committed to living up to its international legal obligations was welcomed by Norwegians. Fife noted to us that much of the passion with which Norwegians challenged U.S. positions can be attributed to four years of "bottled aggression" which was "uncorked" by a chance to present their views directly to a senior U.S. official. Fife remarked that it was healthy to have had such a fulsome exchange on detainees, adding that hearing Bellinger at least made Norwegians realize there are other legitimate, well-reasoned views. We agree. Overall, Norwegian public officials, recognizing the need to mandate policies which protect their citizens while complying with international law and norms, seemed more open to U.S. views than the those outside the government, who are not saddled with those great responsibilities. Bellinger's visit received extensive press coverage and advanced our public diplomacy objectives. We promise that if he comes again, we will go lighter on the schedule. Again, thanks. End comment.

¶12. (SBU) Text of U.S. Diplomatic Note in response to Norway's note on detainees follows:

"The United States believes that it is in a continuing state of international armed conflict with Al Qaida, and, therefore, that the law of armed conflict and international humanitarian law governs our continuing operations in that conflict. Members of Al Qaida have attacked our embassies, our military vessels and military bases, our capital city, and our financial center. The attacks by Al Qaida on the United States on September 11, 2001 killed nearly three thousand people. The UN Security Council has reaffirmed our right of self-defense in relation to these attacks, which were planned and launched from outside the United States, in Resolution 1373. The United States continues to be engaged in an active conflict against Al Qaida and the Taliban in Afghanistan, and the vast majority of Guantanamo detainees were captured by or turned over to our armed forces in Afghanistan. Indeed, leaders of Al Qaida repeatedly have asserted that they are at war with the United States.

The conflict against Al Qaida is not geographically limited to Afghanistan, however: Al Qaida and its allies have engaged and continue to engage in attacks against the United States, its facilities, and its allies worldwide. This international armed conflict does not fall within the ambit of Common

Article 2 of the 1949 Geneva Conventions because Al Qaida is not and cannot be a &High Contracting Party8 as defined by those Conventions. At the same time, the conflict is not confined to the territory of single state, and thus does not fall within the scope of Common Article 3 of the 1949 Geneva Conventions.

This does not mean that the United States believes that it is engaged in an armed conflict with all terrorists everywhere. The U.S. Congress,s Authorization for Use of Military Force, passed on September 18, 2001, states that &the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.8 In any case in which the United States considers whether to use armed force, the U.S. Government would evaluate whether the use of force would be authorized, and whether the specific action to be taken is necessary and proportional to the goal to be achieved. The U.S. Government would evaluate a variety of factors in determining whether military force is appropriate in any given case, including whether the country in which we would act has consented to the action, or is willing and able to address the threat posed by the individual or group at issue. This does not mean that military force will be appropriate in every circumstance. Where it is appropriate to detain, question, and prosecute an individual, we do so; in many cases, this will be the preferred course of action.

In applying the law of armed conflict to the conflict in Afghanistan and with Al Qaida, the United States has determined that Al Qaida and Taliban detainees are not entitled to prisoner of war (POW) privileges provided by the Third Geneva Convention. The Third Geneva Convention accords POW status to enemy forces that follow certain rules specified in Article 4: being commanded by a person responsible for subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war. The President determined that Taliban detainees are not entitled to POW status because they have not effectively distinguished themselves from the civilian population of Afghanistan and have not conducted their operations in accordance with the laws and customs of war. Because Al Qaida is not covered by the Third Geneva Convention, as explained above, it is not a High Contracting Party to the Convention and, in any event, its members fail to meet the requirements of Article 4 of the Convention.

Although the Third Geneva Convention does not apply as a matter of treaty law to those detained at Guantanamo, the United States has provided all such detainees with Combatant Status Review Tribunals (CSRTs). These CSRTs, which determine whether individuals are being properly detained as enemy combatants, are patterned after Article 5 tribunals as those tribunals have developed in practice. In fact, the CSRTs provide greater process for the detainees than have Article 5 tribunals set up by other countries. In proceedings before a CSRT, a detainee may call reasonably available witnesses, question other witnesses, and testify, or decline to do so, at his choice. Each detainee has the right to a personal representative to assist in preparing his case, to receive an unclassified summary of the evidence before the hearing, and to introduce relevant documentary evidence.
The United States has used the term &unlawful combatants8 to describe those found by a CSRT to be Al Qaida and Taliban fighters. This term is used to describe enemy combatants who are not entitled to POW protections by the terms of the Third Geneva Convention, as explained above, and who, because they are combatants, are not protected persons under the terms of the Fourth Geneva Convention. This category of individuals is not a newly-created category; rather, it has appeared for the past fifty years in various treatises on military law and in U.S. and British military manuals. (See, for example,

Adam Roberts, &Counter-terrorism, Armed Force, and the Laws of War,8 Survival, Spring 2002; Alan Rosas, The Legal Status of Prisoners of War, Helsinki 1976.)

The United States does not agree with the contention of the Government of Norway that all combatants not meeting the definition of prisoner of war fall within the Fourth Geneva Convention. There is a genuine gap in the application of the two Conventions with respect to certain persons during an armed conflict. The drafters did not intend the Fourth Convention to protect organized military forces in systematic combat; rather, it is designed to cover civilians. Indeed, aspects of this gap are expressly recognized in the Fourth Geneva Convention, which specifically excludes from its definition of protected persons certain individuals whose countries of nationality maintain diplomatic relations with the detaining power, and which limits protections to a parties own territory and occupied territory (neither of which pertain to Afghanistan, which is not U.S. territory and never occupied by the United States). Contemporaneous statements by the negotiators of the Conventions recognize this gap, and include a statement by the ICRC representative at the 1949 Diplomatic Conference that &although the two conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected.8 At that same conference, the Dutch representative stated that to conclude that individuals who are not POWs under the Third Geneva Convention &are automatically protected by other Conventions is certainly untrue. . . . (The Fourth Geneva Convention) certainly does not protect civilians who are in the battlefield, taking up arms against the adverse party.8 Statements from the UK and Swiss negotiators supported this view as well. Indeed, the very lack of full coverage for non-traditional armed forces in part led states to call for the negotiations that led to Additional Protocols I and II. Although the United States participated in those negotiations, we have not ratified those treaties, partly because we are concerned that Additional Protocol I could allow organizations such as Al Qaida to claim POW status or other protections that are inappropriate for terrorist groups. Because the United States is not a party to Additional Protocols I and II, the United States does not bear any treaty obligations under those instruments.

As the President of the United States stated in his February 7, 2002 order, the values that the United States shares with other civilized nations countenance humane treatment of detainees. Because of these shared values, the President ordered the U.S. Armed Forces to treat detainees in the conflict with Al Qaida and the Taliban humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions.

Norway,s note also discusses the applicability of the Convention Against Torture and the International Covenant on Civil and Political Rights (ICCPR) to these conflicts. The U.S. position on torture is clear: U.S. criminal law and treaty obligations prohibit torture, and the United States will not engage in or condone torture anywhere. In addition, the recently enacted Detainee Treatment Act codifies in U.S. law the prohibition against cruel, inhuman, and degrading treatment contained in Article 16 of the Convention Against Torture, as applicable to the United States by the terms of its reservation to this Article, and makes clear that the prohibition applies to the treatment of all detainees under U.S. control anywhere in the world.

The United States believes that the ICCPR does not apply extraterritorially, and has taken this position consistently since the time at which States adopted the ICCPR. The United States is not alone in interpreting the ICCPR as territorially limited. For example, the Government of the Netherlands told the Human Rights Committee that it disagreed with the suggestion that its U.N. peacekeepers in Srebrenica fell within the ambit of the ICCPR, explaining, &Article 2 of the Covenant clearly states that each State Party

undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the Covenant(It goes without saying that the citizens of Srebrenica, vis--vis the Netherlands, do not come within the scope of that provision.8 U.S. Government policy, applicable to all agencies, is not to transport anyone to a country if we believe it is more likely than not that the individual will be tortured. In some contexts, the United States seeks specific assurances that extend beyond questions of torture. For example, if the receiving State in question is not a party to the CAT, the United States may pursue more specific assurances, which, for example, assure that an individual will be treated humanely and not be subject to cruel, inhuman, or degrading treatment. Renditions, in appropriate circumstances, can be a useful tool to bring terrorists to justice or prevent them from carrying out terrorist acts. Both the United States and European countries have used renditions for many years. For example, a rendition by the French government brought one of history,s most infamous terrorists, best known as Carlos the Jackal, to justice in France, where he is now imprisoned. Indeed, the European Commission of Human Rights rejected Carlos,s claim that his rendition was unlawful.

Although the United States has no obligation to provide the ICRC with notification of or access to Al Qaida or Taliban detainees (who are not entitled to either the status of POWs or protected persons), the United States has made clear that, as a matter of policy, it will provide ICRC notice of and access to such detainees to the maximum extent practicable, consistent with the unique and compelling military and security needs posed by this type of conflict. Consistent with this policy, the ICRC has notice of and access to the vast majority of the detainees held by the U.S. Government in this conflict, and has full access to detainees held at Guantanamo.

The United States appreciates its continuing dialogue with the Government of Norway on these and related issues." End text.

¶13. (U) Legal Advisor Bellinger did not have an opportunity to clear this message.

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